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ALEXANDER L. STEVAS,
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No. 80-2169

IN THE

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA *ex. rel.*,
WILLIAM DAVIS,
Petitioner,

—against—

THOMAS L. JACOBS, Commissioner of Probation and ROBERT ABRAMS Attorney General of the State of New York,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Whether the writ of certiorari should issue pursuant to 28 U.S.C. § 2254 where there never was a certificate of probable cause granted as required by Fed. Rules App. Proc., Rule 22(b).

2. Whether petitioner is entitled to be released from custody pursuant to the "fruit of the poisonous tree" doctrine where he offered a bribe to a police officer who had arrested him on weapons charges after having conducted an admittedly illegal search.

3. Whether there is any support in the record for the contention that this petitioner did not knowingly plead guilty.

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Preliminary Statement

Petitioner was convicted upon his plea of guilty of attempted bribery and attempted possession of a weapon, in the Supreme Court of the State of New York, Kings County, on February 3, 1977. He was sentenced to five years probation. This conviction was partially affirmed on appeal by the Appellate Division of the New York State Supreme Court, Second Department, on October 11, 1977. Leave to appeal to the New York Court of Appeals was denied on December 19, 1977.

Petitioner then filed a motion in the nature of *coram nobis* in the trial court which was denied on March 17, 1978. The denial was affirmed on appeal by the Appellate Division, Second Department on February 19, 1980, leave to appeal to the New York Court of Appeals was denied on April 2, 1980.

Petitioner then applied to the United States District Court for the Eastern District of New York for a writ of *habeas corpus*. Said writ was denied on November 5, 1980. No certificate of probable cause has been granted in this matter.

Statement of Facts

On January 28, 1977, the petitioner, William Davis, pleaded guilty in New York Supreme Court for the County of Kings to the crimes of attempted bribery and attempted possession of a weapon. He was sentenced to five years probation. On two occasions prior to the entry of this plea, petitioner had pleaded guilty to the same crimes and had subsequently withdrawn those pleas, apparently because he did not receive the sentence he wished. The essential facts underlying the charges were that petitioner was stopped on the street while driving a car. The car was searched and a gun was recovered. Follow-

ing his arrest, petitioner offered a bribe to the police officer.

Petitioner moved to suppress the introduction of evidence relative to the gun. This motion was denied after a hearing, and the series of events which subsequently unfolded resulted in his guilty plea. After the entry of the conviction, petitioner appealed to the New York State Supreme Court Appellate Division, Second Department. That court found (after a concession by the prosecutor) that the search of the car was illegal and that evidence of the gun should have been suppressed. Nonetheless, it upheld the bribery conviction, rejecting the argument that the bribery charge was a "fruit" of the illegal search. This ruling of the Appellate Division was not disturbed by the New York Court of Appeals which denied leave by order dated December 19, 1977.

On January 23, 1978, petitioner moved in Supreme Court, Kings County, State of New York for a writ of error *coram nobis* (New York *Criminal Procedure Law* § 440.10 [McKinney, 1971]) to vacate the judgment of conviction; which petition was denied without a hearing. He then appealed this order to the Appellate Division, which affirmed.

On November 5, 1980, the United States District Court, for the Eastern District of New York, denied petitioner's application for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. The writ was denied and subsequent applications for certificates of probable cause have been denied as well.

Summary of Argument

The petition should be denied. Petitioner has not established the required legal predicate which entitles him to seek a writ of certiorari before this Court. 28 U.S.C.

§ 2254 allows a petitioner to seek a writ of certiorari from a case which is "in the court of appeals." Since a certificate of probable cause has never been granted, this case is not in the court of appeals and there can be no review by way of writ of certiorari.

Even if this court were to find that 28 U.S.C. § 1651, with its broad grant of authority allows review of this case, the petition was properly denied since there was no direct causal relationship between petitioner's arrest for possession of a weapon and his decision to bribe the police. Further, the record clearly establishes that this plea was voluntarily entered.

POINT I

Where The Court Of Appeals Denies A Certificate Of Probable Cause, No Appeal Is Permitted. Hence, The Matter Is Not "In The Court Of Appeals" And Cannot Be Reviewed By Way Of Writ Of Certiorari Pursuant To 28 USC § 2254.

Petitioner has cited 28 U.S.C. § 2254 as the predicate for this Court's jurisdiction to consider the instant petition. It is clear that the statute does not provide the authority he claims of it. Pursuant to Fed. Rules App. Proc. Rule 22(3), a denial of a writ of *habeas corpus* can only be appealed if there has been a grant of a certificate of probable cause. In the absence of such a certificate, the case is not "in the court of appeals." See *House* v. *Mayo*, 324 U.S. 42, 44 (1944). It is true that 28 U.S.C. § 1651(a) does grant this Court broader authority than some passed by the other statutes to issue writs of certiorari. Nevertheless, as we shall demonstrate, this is not such a case. Hence, there is no jurisdiction in this Court to grant certiorari.

POINT II

The "Fruit Of The Poisonous Tree" Doctrine Does Not Apply To A Defendant Who Offers A Bribe To The Police After Having Been Subjected To An Illegal Search.

Petitioner was admittedly subjected to an illegal search which resulted in his arrest on weapons charges. Subsequently, he offered a bribe to the police officer. These acts were independent of each other in that there was nothing in this action of the police which necessarily called for the response elicited from petitioner, i.e., the commission of another crime.

Petitioner's reliance on *Wong Sun* v. *United States*, 371 U.S. 71 (1963) is totally inappropriate. In fact, even *Wong Sun, supra* itself recognizes that evidence may be "purged of primary taint" of the initial intrusion, *supra* at p. 488. The issue is whether the subsequent act was a "product of free will", *Brown* v. *Illinois*, 422 U.S. 590, 603 (1975).

In fact, federal courts have refused to apply the "fruit of the poisonous tree" doctrine to this type of case, *cf. Vinyard* v. *United States*, 335 F.2d 176 (8th Cir. 1964), *cert. denied*, 379 U.S. 930 (1965). *United States* v. *Troop*, 235 F.2d 123 (7th Cir. 1956). Clearly, there is no credible issue presented there which requires this Court's review.

POINT III

The Record In No Way Establishes That The Plea Entered By Petitioner Was Coerced Or Involuntary.

Petitioner maintains here, as he has throughout, that his plea was not voluntarily entered. He also conveniently underplays here, as he has throughout, the two

prior occasions on which he pleaded guilty and subsequently withdrew the plea (January 23, 1976 and December 16, 1976). On neither of these prior two occasions did he ever stumble when asked if he committed the crime.

In view of this fact and the substantial allocutions which were made on three occasions expressing the voluntariness of the plea and the fact that petitioner understood what he was doing, it is nothing short of outrageous that a defendant who pleaded guilty of his own free will and obtained a sentence of probation has inundated the state with reams of paper alleging that his plea was involuntary. The record is clearly to the contrary and the courts below properly decided to deny relief without a hearing. Similarly, the District Court properly denied the writ.

CONCLUSION

The petition for a writ of certiorari should be denied in all respects.

Dated: Brooklyn, New York.

Respectfully submitted,

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